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NO. 04-340

In The Supreme Court Of The United States

SAN REMO HOTEL L.P., et al.,
Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF *AMICUS CURIAE* FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITIONERS

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BRIEF OF FRANKLIN P. KOTTSCHADE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

With the joint written consent of the parties filed with the Clerk of the Court, Franklin P. Kottschade respectfully submits this brief as *amicus curiae*.[1]

INTEREST OF AMICUS CURIAE

Franklin P. Kottschade is a realtor and real estate developer from Rochester, Minnesota. He has been an active leader in associations of realtors and home builders at the national, state, and local level for many years, and an active participant in charitable and community projects.

Mr. Kottschade's interest in this case stems from his own personal experiences in a similar case recently. (*Kottschade v. City of Rochester*, 319 F.3d 1038 [8th Cir. 2003], *cert. denied*, No. 02-1848 [10/6/03].)

Mr. Kottschade filed his suit directly in U.S. District Court, without attempting to "ripen" his case in state court, as described in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 437 U.S. 172 (1985). As Mr. Kottschade explained, there was an extreme danger that taking the case first to state court would ultimately deprive him of any opportunity to have his

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[1] Counsel for *amicus curiae* authored this brief in whole and no other person or entity other than *amicus* or his counsel has made a monetary contribution to the preparation or submission of this brief.

federal constitutional issues heard in federal court. The 8th Circuit agreed that this concern was "justly" held. (319 F.3d at 1041.)

The decision below bears out that concern. Here, once the property owners had gone to state court — under the compulsion of *Williamson County* — and litigated *only* state law issues there, the 9th Circuit held that they were *legally precluded* from pursuing *any federal* claims in federal court. (Pet. App. 4a)

Mr. Kottschade appears here as the proverbial "Exhibit A" to the adage, "you can't get here from there." The San Remo Hotel tried its case in state court and was thereafter prevented from litigating in federal court on the ground that the state court litigation was the "equivalent" of seeking the protection of the federal courts. (Pet. App. 4a) Mr. Kottschade's fear expressed to the 8th Circuit proved unfortunately prophetic.

Moreover, this Court's more recent decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), allowing removal of such "ripening" cases from state to federal courts by defendant municipalities, had to have affected the *Williamson County* requirement. Acknowledging that the presence of both precedents exposed an "anomalous . . . gap in Supreme Court jurisprudence" (319 F.3d at 1041), the 8th Circuit said only this Court could bridge that gap in Mr. Kottschade's — or anyone else's — case.

Mr. Kottschade brings to this argument his experience in trying to litigate federal constitutional claims in federal court. He is a living, breathing

example of what is wrong with *Williamson County* as it operates in reality.

SUMMARY OF ARGUMENT

1. It is time for the Court to reconsider the requirement of state court litigation laid down in *Williamson County*. The underlying premise of that case goes beyond the plain language and meaning of the 5th Amendment. A city's taking of private property without just compensation is complete when property is taken and compensation is not paid *by the city*. It does not require a judicial determination to complete, or ripen, the taking. And, if it did, there is no reason why such a determination must take place in state court.

The Court's more recent decision in *City of Chicago*, authorizing a municipal defendant to remove a state court takings proceeding immediately to federal court, emphasizes the flaw in *Williamson County*. As removal is proper *only* if the plaintiff could have brought suit in federal court in the first place (28 U.S.C. § 1441[a]) — something *Williamson County* forbids — the two precedents dealing with state court 5th Amendment litigation cannot consistently co-exist.

2. If the Court decides to maintain *Williamson County*'s rule that state litigation is necessary to "ripen" a 5th Amendment takings claim for federal court litigation, then lower courts need to be instructed that general doctrines of preclusion (e.g., res judicata, collateral estoppel, *Rooker-Feldman*) do not apply.

Unlike other kinds of litigation, takings claimants have been told that state court litigation is required before federal court litigation is ripe. Thus, it cannot be that plaintiffs who do precisely as this Court instructed and ripen their claims by litigating in state court can then be told — as San Remo Hotel was at bench — that the state litigation was the "equivalent" of federal litigation and their efforts to ripen a 5th Amendment claim automatically precluded ever bringing a 5th Amendment claim.

I

WILLIAMSON COUNTY CONTAINED A FATAL FLAW: IT WRONGLY ASSUMED THAT A 5TH AMENDMENT TAKING WITHOUT JUST COMPENSATION IS NOT COMPLETE UNTIL A STATE COURT ADJUDICATES THAT THE LOCAL AGENCY REALLY WILL NOT PAY.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights incorporated into the 14th Amendment's Due Process Clause)[2] prohibits government from taking private property for public use unless it pays just compensation. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. There is nothing in either logic or the language of the 5th Amendment to require state court certification of non-payment before the taking is complete.

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[2] *Chicago B.& Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

That is *Williamson County*'s flaw: it held that the taking was not complete until compensation was denied not just by the taking entity, but also by the state courts.

Williamson County quite properly began its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blurred the distinction between acts of the agency that actually committed the taking and the State that may or may not have provided compensation through litigation. (473 U.S. at 195-196.)

But the *state* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity — like the City and County of San Francisco at bench — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court deference. It does not

say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"[3]

The issue is not whether a state has countenanced the constitutional violation, but whether the municipal defendant has committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[4] and nonpayment by the taker. When a city council — like San Francisco's — conscripts private property into public service without any pretext of compensation, it violates the 5th Amendment. The presence or absence of a state remedy has no bearing on whether the malefactor did the deed.

A year after *Williamson County*, the Court seemed to understand this, explaining *Williamson County* as being based on the premise that "a court

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[3] Indeed, when adopted, the 5th Amendment applied only to the federal government The 14th Amendment applied its precepts to the states, but there have been no developments in constitutional law suggesting that this provision has been *de facto* amended to exclude the federal courts from enforcing it.

[4] As explained in *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945), it is the deprivation of the owner, not the accretion of any interest to the taker, that constitutes the compensable taking.

cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body intends to provide*." (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 [1986]; citation omitted; emphasis added.) At another point, the same opinion talks of determining "if *proffered* compensation is 'just.'" (477 U.S. at 350; emphasis added.) Neither formulation requires state court litigation. If needed, a simple inquiry can answer questions of "intent" and "proffer."

After saying that in *MacDonald*, the Court again explained *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320, fn. 10 [1987]; emphasis added), without any reference to whether a state court had refused to *order* payment. In any event, if a city refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated.

Deferring to state courts is tantamount to granting states a veto over access to federal court, making them *de facto* federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988],

quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)[5]

Mandating suit in state court imports into the 5th Amendment a remedial requirement when the just compensation language is a limitation on government's inherent power, not an invitation to sue for payment,[6] and where the Just Compensation Clause is self-executing. (*First English*, 482 U.S. at 315.)

If nothing else, any required suit for payment is contrary to Congressional policy established in 1970 in

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[5] Granting states such a position leads to a *sub rosa* resuscitation of the discredited "interposition doctrine" that reared its head briefly in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954) (i.e., the southern strategy of "interposing" sovereign state law to ward off the effects of decisions like *Brown*), only to be interred a few years later. (See *Cooper v. Aaron*, 358 U.S. 1 [1958]; see also *Estes v. Texas*, 381 U.S. 532, 566 [1965], in which the trial judge proclaimed that his oath was to uphold the *state* constitution, rather then the *federal*. Needless to say, this Court corrected him.)

[6] See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 219-225 (2003).

the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the old days of grabbing property first and then saying "sue me" to the aggrieved owner are over. That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation.[7] Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651[1]) or, failing that, condemnation (42 U.S.C. § 4651[8]).

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other

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[7] The Act provides succinctly, "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." (42 U.S.C. § 4651[8].) To make this a truly "uniform" law, as its title advertised, the policies in Section 4651 were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. (42 U.S.C. § 4655.) California, like other states, has complied. (Cal. Govt. Code § 7267.6 [making the standard applicable to all projects, not merely those with federal funding].)

cases, should belong in the first instance to the plaintiff.[8]

Nor are other constitutional rights treated that way.[9] Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape*, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"]; cf. *Screws v. U.S.*, 325 U.S. 91, 108 [1945].)[10]

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)[11]

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[8] *Bell v. Hood*, 327 U.S. 678, 681 (1946): "a party who brings a suit is master to decide what law he will rely upon."

[9] *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. (E.g., *Preseault v. I.C.C.*, 494 U.S. 1 [1990].) That is all the San Remo Hotel and its owners (and others like them) want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

[10] The lone exception is habeas corpus, where all issues (state and federal) must be raised in state court first. (28 U.S.C. § 2254[b].) However, once done, a habeas petitioner is not subjected to res judicata and full faith and credit barriers upon arriving in federal court. The issues may be argued afresh. (See, e.g, *Wainwright v. Sykes*, 433 U.S. 72, 80 [1977].)

[11] See also Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues: Public and Private Perspectives, ch. 20 (ABA 2002; Thomas E. Roberts, ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

There is no need to sue in State court merely to confirm the non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. This can be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That process consumed 13 years. At no time — even after a trial on the merits resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

Nor is a state suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless public hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. San Francisco was not in doubt about that claim. It simply chose not to honor it. Imposing on the San Remo Hotel (not to mention the time of the state courts) merely to confirm that obvious fact serves no legitimate purpose.

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a core federal constitutional issue. As shown below, lower court efforts to grapple with this rule, attempting to apply it while also giving deference

to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error and overrule the state court ripening requirement.

II

THE MORE RECENT DECISION IN *CITY OF CHICAGO*, RENDERED A DOZEN YEARS AFTER *WILLIAMSON COUNTY*, HAD TO HAVE A SUBSTANTIVE IMPACT ON THE "RIPENESS" PROCEDURE IN TAKINGS CASES.

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the property owner did as instructed by *Williamson County*: it filed a state court action challenging the validity of land use regulations. The complaint raised due process, equal protection and takings claims. (See 522 U.S. at 160.)

The Court held that it was proper for the municipal defendant to remove the case to federal court under 28 U.S.C. § 1441(a). Section 1441(a) permits removal *if, but only if*, the plaintiff could have brought suit in federal court in the first place, but chose not to. The statute gives the defendant the even-handed ability to invoke federal jurisdiction as well.

It somehow got overlooked that, as a land use plaintiff, the International College of Surgeons could *not* have sued the City of Chicago in federal court; *Williamson County* precluded it. Nonetheless, the Court held removal was proper because "a case containing claims that local administrative action violates federal

law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.) The Court added that "the facial and as-applied federal constitutional claims raised by ICS 'arise under' federal law for purposes of federal question jurisdiction." (522 U.S. at 167-168.)

Justice Ginsberg's dissent emphasized *City of Chicago*'s momentous nature, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsberg, J., dissenting.)

Believing that the *City of Chicago* decision had to impact *Williamson County*, Mr. Kottschade asked the 8th Circuit to reconcile them and allow suit to proceed in federal court. After all, if the City of Chicago could remove its litigation to federal court on the ground that it could have been initiated there, then Frank Kottschade ought to be able to file suit there directly under the fair reciprocity theory underlying 28 U.S.C. § 1441(a).

The 8th Circuit acknowledged what it called an "anomalous . . . gap in Supreme Court jurisprudence," but declined to address it, concluding that how to resolve the conflict "is for the Supreme Court to say, not us." (319 F.3d at 1041.)

City of Chicago demonstrates the error in *Williamson County*. Unburdened by being reminded of *Williamson County*,[12] the Court accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance.

Precedents are not cast away lightly. However, when scholars have been critical of its decisions,[13] when application of a precedent has produced a rule that "stands only as a trap for the unwary,"[14] when necessary to clarify the implications of earlier decisions,[15] when decisions of the Court are "if not directly . . . [conflicting,] are so in principle,"[16] or when "the answer suggested by [the Court's] prior opinions is not free of

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12 In fairness to the Court, the adversary system seems to have failed. Neither of the parties to *City of Chicago* cited *Williamson County*, and only one amicus brief even mentioned it (and that one only tangentially), so the Court was uninformed about the full consequences of its actions.

13 *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

14 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

15 *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

16 *Funk v. U.S.*, 290 U.S. 371, 374 (1933).

ambiguity,"[17] the Court has reviewed its earlier decisions and corrected its own errors. Each of those factors applies to *Williamson County*.

III

IF *WILLIAMSON COUNTY* CORRECTLY APPLIED THE 5TH AMENDMENT TO REQUIRE STATE COURT LITIGATION IN ORDER TO "RIPEN" FEDERAL COURT LITIGATION, THEN LOWER COURTS HAVE MISAPPLIED PRECLUSION DOCTRINES TO PREVENT THE RIPENED FEDERAL COURT LITIGATION.

If the Court decides that *Williamson County*'s state court requirement serves a constitutional purpose, then lower courts need to be told that the determination under state law cannot be used in conjunction with preclusion doctrines to prevent eventual federal court decision of the 5th Amendment taking issue.

A

The Premise of *Williamson County* Was That Property Owners Would Be Able To Obtain A Federal Court Ruling On The Merits Of Their Regulatory Taking Claims After They First "Ripened" Their Cases In State Court.

Even commentators opposed to landowners litigating regulatory taking cases in federal courts

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[17] *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

concede that the plain language of *Williamson County* contains a clear promise of federal court access:

> "Reliance [by the Court] on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in federal courts after their state suits are over." (Thomas Roberts, *Fifth Amendment Taking claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 480 [1992].)

Williamson County made clear that the Court was creating a two-step procedure for regulatory taking cases. Its plain language shows that the Court was (a) deciding whether a claim was ***yet*** ripe for litigation in federal court and (b) that there were things which ***first*** had to be done in state court ***after which*** the federal constitutional claims ***would be ripe*** for federal court.

The Court's analytical discussion began by saying that ". . . respondent's claim is *premature*." (473 U.S. at 185; emphasis added.)[18] Prematurity necessarily means that something is yet to be done to make the matter

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[18] The Court did *not* say there was no valid claim. Nor could it. Federal courts at that time had dealt with such claims — as they routinely dealt with other Bill of Rights claims — for years. E.g., *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir. 1983); *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982); *Fountain v. Metro Atlanta Rapid Trans. Auth.*, 678 F.2d 1038 (11th Cir. 1982).

mature, or jurisprudentially 'ripe." *Williamson County* then said that, because of failure to obtain a final administrative determination (not at issue here) and failure to sue under state law, ". . . respondent's claim is *not yet ripe*." (473 U.S. at 186; emphasis added.)

Throughout the opinion, the Court emphasized the temporal nature of its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court. The Court's language demonstrated that the Court plainly was *delaying* a property owner's entry into the federal courthouse, not barring it:

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so." (473 U.S. at 194; emphasis added.)
>
> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." (473 U.S. at 195; emphasis added.)
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is *premature*." (473 U.S. at 197; emphasis added.)

The opinion ended as it began, with this conclusion:

> "[R]espondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." (473 U.S. at 200; emphasis added.)

As noted above, *Williamson County* analogized to takings litigation involving federal statutes. (473 U.S. at 195.) To the extent that analogy has utility, it is this: before a plaintiff can sue in U.S. District Court for a declaration that a federal statute is invalid as an uncompensated taking of property, she must first sue in the Court of Federal Claims to seek compensation. If compensation is denied, litigation regarding invalidation becomes ripe. But the denial of compensation doesn't preclude the later suit, it ripens it. (See *Preseault v. I.C.C.*, 494 U.S. 1 [1990].)

So, here, once the state courts conclude as a matter of state law that compensation is not required, then federal litigation — on a clean slate — is timely.[19]

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[19] A clean slate is necessary, as the Court has recognized in the abstention context: "How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. . . . Thus, in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, *a litigant may not be unwillingly deprived of that determination . . . [nor of] his right to litigate his federal claims fully in the federal courts*." (*England*, 375 U.S. at 416-417; emphasis added.)

B

Lower Courts Have Misused *Williamson County* As A Device To Prevent Property Owners — Alone Among Citizens — From Litigating *Federal* Constitutional Issues In *Federal* Court.

Williamson County's evident establishment of a system by which property owners could eventually litigate federal issues in federal court was in keeping with a long line of decisions holding that those who plead federal claims and seek the aid of federal courts have a right to a federal determination. (E.g., *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 [1909]; *Bell v. Hood*, 327 U.S. 678, 681 [1946]; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 [1964].) As the Court put it, there are "fundamental objections" to compelling a plaintiff who has legitimately invoked federal jurisdiction "without his consent and with no fault of his own, to accept instead a state court's determination of those claims." (*England*, 375 U.S. at 415.) And yet accepting California's determination — against their will — is precisely what the 9th Circuit compelled Petitioners to do here.

Williamson County was founded on the twin concepts of "not yet" and "not until." But lower courts have lost track of that. Instead, property owners — like San Remo Hotel — who satisfy *Williamson County* find, when attempting to file their now-ripened federal suits, that the door is barred by res judicata, collateral estoppel, or some other preclusion doctrine. Thus, the upshot is that this Court's endorsement of property

owners' right to litigate in federal court *after ripening their suits in state court* has been overruled by lower courts. Instead, takings plaintiffs have been banished to state courts.

If that had been this Court's intent, *Williamson County* could have said so. Directly. But it did not. Neither *Williamson County*, nor the Congress that enacted 42 U.S.C. § 1983 had that in mind. Quite the contrary.[20] In a recent decision, the 6th Circuit was unequivocal:

> "*Williamson County* . . . clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court." (*DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 518, fn. 3 [6th Cir. 2004] [refusing to apply *Rooker-Feldman* doctrine].)

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[20] The Court has been unequivocal that the goal of Section 1983 is "to provide compensatory relief to those deprived of their *federal* rights by state actors" (*Felder v. Casey* 487 U.S. 131, 141 [1988]; emphasis added) by "interpose[ing] the *federal courts* between the States and the people, as guardians of *the people's federal rights*." (*Mitchum v. Foster*, 407 U.S. 225, 243 [1972]; emphasis added.) To effectuate that goal, Congress intended to "throw open the doors of the United States courts" to those who alleged deprivation of constitutional rights "and to provide these individuals ***immediate*** *access to the federal courts* . . . ." (*Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 [1982]; emphasis added.)

All commentators agree that the Court's words plainly tell property owners that the way to litigate their 5th Amendment claims in federal court is to "ripen" them by litigating first in state court, repairing thereafter to federal court.[21]

Other than property owners seeking constitutional redress, federal claimants are not required to "ripen" claims in state courts. (E.g., Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millenium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683, 685 [1999].) "The state compensation portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law." (Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 [1995].)

Indeed. Other Section 1983 litigation is not

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[21] E.g., Steven J. Eagle, Regulatory Takings 1063 (2d ed. 2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language . . . suggests that the state law suit is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000) ("language . . . suggested that, eventually, a litigant's taking claim would be heard in federal court"); *Id.* at 249 ("language of Williamson suggests that a federal claim will survive after disposition in the state court").

subjected to any state court litigation requirement:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." (*Monroe v. Pape*, 365 U.S. 167, 183 [1961].)

But property owners with *5th Amendment* claims, and they alone, are denied the benefit of that rule.[22] The mechanism lower courts have used to thwart both the plain language and evident intent of *Williamson County* and federal claimants' right of access to federal court has been to combine *Williamson County*'s requirement of state court litigation with general doctrines of claim and issue preclusion.

Federal cases dismissing property owners' "ripened" efforts at federal court litigation abound. (In addition to the case at bench, see, e.g., *Dodd v. Hood*

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[22] Even property owners face no such ripeness hurdle if they raise *1st Amendment* claims. (See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 [1986]; *Larkin v. Grendel's Den*, 459 U.S. 116 [1982].) Only 5th Amendment claims receive this second-class treatment. (Compare *Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994] ["We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ."].)

River County, 136 F.3d 1219 [9th Cir. 1998]; *Peduto v. City of North Wildwood*, 878 F.2d 725 [3d Cir. 1989]; *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 [10th Cir. 1998]; *Rainey Brothers Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998 [W.D. Tenn. 1997], *aff'd* 178 F.3d 1295 [6th Cir. 1999][table][unpublished 6th Circuit opinion at 1999 U.S. App. LEXIS 6396].)

Thus, according to these cases, "the very act of 'ripening' a case also ends it." (Robert H. Freilich, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 [1999].) In Prof. Roberts' colorful words:

> "Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from green to mushy red overnight. It is never able to be eaten." (Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 72 [1995].)

As seems evident from the language of *Williamson County* and its underlying theory of "ripening" matters for federal court litigation, this Court intended no such thing. Rather, it preserved property owners' opportunity to litigate their 5th Amendment case in federal court. It is therefore apparent that the lower

courts are undermining the Court's intent.[23]

A recent decision agrees that the Court could not have designed this result:

> "The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions; reading *Williamson County*, the expectation is that an unsuccessful state plaintiff will then return to federal court." (*DLX*, 381 F.3d at 520.)

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[23] The Court made it crystal clear in *England*, 375 U.S. at 416-417 that limiting a litigant to certiorari review from a state supreme court was not an acceptable substitute for full federal court litigation. (The decision below, holding the state court decision the "equivalent" of federal litigation [Pet. App. 4a] cannot be reconciled with the Court's view. See David L. Callies, *Regulatory Takings and the Supreme Court: How the Perspectives on Property Rights Have Changed From* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 574 [1999] [lower courts are not hearing or not wanting to hear the Supreme Court].) Besides, state courts often dispose of cases on the basis of state law — as the California Supreme Court consciously did at bench (Pet. App. 107a, fn. 1, 170a, 194a) — so that seeking certiorari from such a decision may not even be possible.

The general preclusion doctrines being used to bar property owners from federal court were known to this Court when it decided *Williamson County*. They are the stuff of first year civil procedure. Just as plainly, *Williamson County* established a system that mandated dual court litigation: first in state court, to test the state compensation remedy and thereby "ripen" the case, followed by an action in federal court, to litigate the merits of the underlying 5th Amendment claims. That was an inefficient process, but at least it was rational.

But if the lower courts are correct, then the *Williamson County* "ripening" procedure was stillborn, and the Court wasted its time in formulating it. As the 10th Circuit put it, "It is difficult to reconcile the ripeness requirements of *Williamson* with the laws of res judicata and collateral estoppel." (*Wilkinson*, 146 F.3d at 1325, fn. 4.)

Mr. Kottschade believes it would be preferable to re-examine the underpinnings of *Williamson County* and overrule its state litigation requirement. As the American Planning Association once forthrightly told the Court, "[t]his Court should . . . eliminate the second prong of the ripeness doctrine that requires landowners to seek and be denied just compensation through available state procedures." (Amicus Curiae Brief of American Planning Association in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 [1997].)

However, if the inefficient, double litigation, ripening system is to be retained, then lower courts need to be instructed that the general doctrines of preclusion

do not apply in these cases. A special procedure has been created for regulatory taking cases that requires initial application to state courts, and the act of following that procedure cannot thereafter be used to prevent the ripened suit from being tried on its merits.

CONCLUSION

Williamson County's requirement of ripening 5th Amendment takings claims in state court is one of those ideas that probably sounded good at a theoretical level. As it has been applied during the past two decades, however, it has been a nightmare. It has caused needless anguish to property owners (some of whom, like Mr. Kottschade, are filing amicus curiae briefs here to share their experiences and concerns with the Court). It has caused wastefully duplicative litigation for state and federal court systems. And it has created a field day for criticism by lower courts and commentators.[24]

Citizens, lawyers, and — particularly — busy trial judges don't work at a theoretical level. Of necessity, they are concerned with nuts and bolts, rather than casuistically parsing words and theories and

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[24] A collection of colorful critiques like "absurd," "shocking," "draconian," "fraud," "hoax," and "Kafkaesque" (and many more) may be found in Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urban Lawyer 671, 702-703 (2004).

attempting to fit unfamiliar concepts (like the state court ripeness rule) into a matrix that already includes rules of claim and issue preclusion with which industrious trial judges work on a daily basis.

The idea that property owners with 5th Amendment claims — alone — should be precluded from asking federal courts to rule on their federal claims is anathema. It undercuts the Bill of Rights and minimizes the protections afforded American citizens. Indeed, the sum and substance of the lower court decisions applying variants of what they perceive to be the *Williamson County* rule is that property owners' 5th Amendment takings claims *cannot be heard in any court, state or federal.* Why? Because by the time they finish litigating their *state* constitutional taking claim in state court, that decision will have preclusive effect not only on a subsequent federal suit, but on any later attempt by the state court to adjudicate the 5th Amendment claim. Whatever that is, it is not law. It is a tragic-comic parody of law.

It is time to call a halt to the pointless, and plainly unintended, game playing to which property owners have been subjected. They have become the shuttlecocks of constitutional litigation, subject to dismissal under *Williamson County* if they deign to file in federal court, but also subject to removal under *City of Chicago* if they file in state court and their municipal opponents would prefer a federal forum. Constitutional rights deserve better.

Either *Williamson County*'s state court litigation requirement needs to be overruled, or lower courts need to be clearly told that the concept of "ripening" means just that: ripening. It cannot be a poison pill, nor can it convert state court litigation into the "equivalent" of federal court litigation if the Constitution is to have meaning.

Respectfully submitted,

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